IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 173 of 2020

BETWEEN:

RASUKAI SALABABA RALULU aka RASUWAKI SALABABA and JOKAVETI DOLANAISORO
PLAINTIFF

AND:

PREM CHAND and VINOD CHAND
1ST DEFENDANT

AND:

NIRMALA
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSEL:
Ms. S. Reddy for the plaintiff
Mr. N. S. Khan for the defendant's

Date of Hearing:
29 September 2023

Date of Ruling:
27 October 2023

RULING

01. Defendants on the 09/06/2021, have filed Summons to Strike Out the Plaintiffs action (as a whole) firstly on the ground that the Plaintiff's claim is statute barred pursuant to the Limitation Act Cap 35 and secondly on the grounds that it does not disclose a reasonable cause of action, it is scandalous, frivolous, or vexatious and it is otherwise an abuse of the process of the court. This summons is supported with an affidavit of Vinod Chand sworn on the 05/05/2021.

02. Plaintiffs have opposed this summons and have filed an affidavit in opposition on the 05/04/2022 sworn by Rasuwaki Salababa.

03. Defendants then filed an affidavit in reply on the 13/05/2022 as sworn by Vinod Chand.

04. Summons for striking out was then fixed for Hearing before this court on the 29/09/2023. However, the parties moved from court to have the Hearing done by way of written submissions and sort time to file written submissions accordingly. This court having allowed the above application, both parties have filed their respective written submissions on the 06/10/2023.

05. Having considered the affidavit evidence of the parties and the written submissions tendered, I now proceed to make my Ruling on the Summons to Strike Out as follows.

06. The orders sort as per the Plaintiffs Writ of Summons are as follows:

I. A declaration that the Defendants are unjustly enriched by the said property.
II. Compensation for house and improvements effected on the 1st Defendants property by the Plaintiffs.
III. General damages against the Defendants.
IV. Indemnity Costs.
V. Interests.

VI. Any other orders this Honourable Court deems just.

07. As per the statement of claim in this case, it is submitted that the Plaintiffs have built a dwelling house valued at $ 80000.00 on the land belonging to the first named Defendants. The Plaintiffs have claimed that they had a land in the same area as of the Defendants land and a contractor was hired to build a dwelling house on their land. However, mistakenly, and erroneously the house was built on the Defendants land. This house had had been constructed in March 2006 and thereafter the Plaintiffs occupied the said house.

08. On the 19th of May 2007 the Defendants through their solicitors had advised the Plaintiffs of their mistake and then later had evicted the Plaintiffs from the said house through a court action. Plaintiffs allege that the first named Defendants through the 2nd named Defendant, who is the sole administratrix of the estate of Sushil Chand, were aware of the Plaintiffs mistake in constructing the house on the first named Defendants land but did not at any time attempt to stop the same. Further, the Plaintiffs allege that after the Plaintiffs were evicted from the said house, the Defendants had rented this house and continue enriching themselves at the expense of the Plaintiffs mistake. The Plaintiffs therefore are seeking compensation and damages over unjust enrichment.

09. The Defendants, by their statement of defence, have denied any knowledge over the construction of the house by the Plaintiff in their land at the time of the said construction. Defendants have submitted that both the first named Defendants and the second named Defendant had migrated and were living in Canada at the time of the said construction. Defendants further claim that the Plaintiffs land is situated in a different street that from the Defendants land and thus the Plaintiffs actions in constructing the said house in their land is illegal as they had trespassed into the Defendants land. As such the Defendants submit that the Plaintiffs cannot demand any damages or compensation from the Defendants based on their illegal actions.

10. However, in filing this application to strike out, the Defendants submit firstly that this action is statute barred as the claim is for monetary relief based on the ground of 'mistake'. It is submitted that the claim is thus prescribed pursuant to section 15 of the Limitation Act, since the 'mistake' was in fact discovered in 2007 by the Plaintiffs and the 06 years prescription period from the date of the discovery of the 'mistake' had come to an end in the year 2013.

11. It is further submitted that even the claim for 'unjust enrichment' is statute barred though being an equitable remedy. It is submitted that pursuant to section 4 (7) of the Limitation Act, the time limit of 06 years prescribed for monetary relief by way of compensation and damages shall apply to this equitable relief of 'unjust enrichment' by analogy, as the Plaintiffs claim is for compensation and damages.

12. The Defendants have further submitted that the Plaintiffs cannot maintain a claim for 'unjust enrichment' based on 'mistake' as there was no part played by the Defendants in the Plaintiffs mistake and that the actions of the Plaintiffs are illegal as it is a trespass and as such violated the property rights of the Defendants. It is submitted that the Defendants therefore cannot be held to have unjustly enriched in such circumstances. Thus, the Defendants submit that the Statement of Claim fails to disclose a reasonable cause of action, that it is frivolous and vexatious and an abuse of process.

13. Plaintiff's position as explained through the Affidavit in Opposition is that they had initiated similar proceedings against the Defendants based on the same cause of actions in 2013 (HBC 87/2013). However, due to a technical error (failure to comply with Order 6 Rule 6 of the High Court Rules), this matter was dismissed and struck out by the Court on the 25/10/2019. As such the Plaintiffs submit that the action was in fact brought in 2013 against the Defendants and as such it is within the 06-year prescription period.

14. Plaintiffs further submit that they never intended to build a house on the Defendants land and that it was a clear mistake. The Defendants land, by the time this house was built, was just a vacant land which the Defendants may not have been receiving any monetary gain. It is claimed that the Defendants are now enriching themselves from this mistake by renting out the house and as such their claim for damages discloses a reasonable cause of action.

15. In reply to the affidavit in opposition, the Defendants had submitted that the Plaintiffs actions are in fact illegal as they had trespassed into the Defendants land and illegally built a dwelling house on their land. It is further submitted that as all the Defendants had migrated to Canada and were living in Canada well before the Plaintiffs built their house on the Defendants land, they had no knowledge and had no means whatsoever of having any knowledge of the Plaintiffs illegal actions. However, it is submitted that, in the contrary, the Plaintiffs have been residing in Fiji all throughout this period. Further, the Defendants submit that due to the illegal actions by the Plaintiffs, they had lost their right to enjoy their property, in a manner the Defendants wished to do so, and is now forced to keep the house built by the Plaintiffs on their land as it is immovable property. Moreover, the Defendants submit that when the Plaintiffs were evicted from their land, they had damaged the building extensively and the Defendants had to spend on repairs to make it usable.

16. Plaintiffs in their written submissions relies in the case of ***John Cauchi vs Air Fiji Limited & Air Pacific Limited; HBC 331 of 2001 (11th March 2003)*** to argue that the limitation period pursuant to the Limitations Act should be considered along with the initial case that was brought in against the Defendants in 2013 (HBC 87/2013) as this

is the time the action against the Defendants were 'brought' and as such it is not time barred.

17. Further, the Plaintiffs submit that the claim against the Defendants is a continuous cause of action as the Defendants continue to enrich themselves unjustly from the Plaintiffs mistake. As such it is the submission of the Plaintiffs that their claim cannot be time barred as it is a continuous cause of action. In support of this contention, the Plaintiffs rely in the Court of Appeal decision in ***Lok v Director of Lands; ABU13.2017 (5 October 2018)***.

18. Moreover, the Plaintiffs had submitted that since the initial case against the Defendants (HBC 87/2013) was dismissed by the Court on a technical ground on the 25/10/2019, the current action is not time barred pursuant to section 4 (4) of the Limitations Act, where it is stated that 'An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable,…'. It is submitted since 12 years has not lapsed from the date of the judgment in HBC 87/2013, the Plaintiffs action is not time barred.

19. I shall now move on to consider the relevant legal provisions and the legal precedence in respect of a Striking Out application. Defendants have filed their Summons to Strike Out pursuant to all grounds from (a) to (d) at Order 18 Rule 18 (1) and Order 18 Rule 5, 6, and 9 of the High Court Rules 1988. Order 18 Rule 18 is as follows.

Striking out pleadings and indorsements (O.18, r.18)

18.- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that–

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the

summons or petition, as the case may be, were a pleading.

20. Master Azhar, in the case of **VERONIKA MEREONI V FIJI ROADS AUTHORITY:** HBC 199/2015 [Ruling; 23/10/2017] has succinctly explained the essence of this Rule in the following words.

"At a glance, this rule gives two basic messages, and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summery procedure of pre-emptory striking out. Firstly, the power given under this rule is permissive which is indicated in the word "may" used at the beginning of this rule as opposed to mandatory. It is a "may do" provision contrary to "must do" provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not ***necessarily*** *be struck out as the court can, still, order for amendment. In* ***Carl Zeiss Stiftung v Rayner & Keeler Ltd*** *(No 3) [1970] Ch. 506, it was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.* ***MARSACK J.A.*** *giving concurring judgment of the Court of Appeal in* ***Attorney General v Halka*** ***[1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972)*** *held that:*

"Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

21. The first ground to consider in respect of the Summons to Strike Out by the Defendants is the absence of a reasonable cause of action. No evidence is admissible for this ground for the obvious reason that, the court may only conclude an absence of a reasonable cause of action, merely on the pleadings itself, without any extraneous evidence. His Lordship the Chief Justice A.H.C.T. GATES (as His Lordship then was) in ***Razak v Fiji Sugar Corporation Ltd*** ***[2005] FJHC 720; HBC208.1998L (23 February 2005)*** held that:

"To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498".

22. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

"A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood

and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.

23. The Court may not use its discretionary power to strike out a claim under this Rule, for the reasons it is weak, or the plaintiff is unlikely to succeed. The power should rather be used when the claim is obviously unsustainable. His Lordship the Chief Justice A.H.C.T. GATES in ***Razak v Fiji Sugar Corporation Ltd*** (supra) held that:

"The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

24. If the statement of claim or defence contains degrading charges which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (see: **The White Book** Volume 1 (1999 Edition) at para 18/19/15 at page 350). Likewise, if the proceedings were brought with the intention of annoying or embarrassing a person or brought for collateral purposes or irrespective of the motive, if the proceedings are obviously untenable or manifestly groundless as to be utterly hopeless, such proceedings becomes frivolous and vexatious (per: Roden J in **Attorney General v Wentworth** (1988) 14 NSWLR 481, said at 491).

25. In The **White Book** in Volume 1 (1987 Edition) at para 18/19/14 states that:

"Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663)".

26. On the other hand, if the action is filed without serious purpose and having no use, but intended to annoy or harass the other party, it is frivolous and vexatious. Roden J in **Attorney General v Wentworth** (1988) 14 NSWLR 481, said at 491 that:

1. *Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*

2. *They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*

3. *They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*

27. In Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads:

"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

28. The Plaintiff's claim is for damages against the Defendants for 'unjust enrichment' based on a 'mistake', at the expense of the Plaintiffs. It should therefore be evaluated whether there lies a cause of action for damages on 'unjust enrichment'. In this regard, I shall refer to the case of ***Manohan Aluminum & Glass (Fiji) Ltd v Fong Sun Development Ltd; ABU0018.2015 (8 March 2018)*** as submitted by the counsel for the Defendants in their written submissions. As per the Court of Appeal decision in this case, it is abundantly clear that there shall be no cause of action for 'damages' on 'unjust enrichment' and the Plaintiffs claim for damages over 'unjust enrichment' is erroneous. Their Lordships of the Court of Appeal, referring to the case of ***Daydream*** **Cruises Ltd v Myres [2005] FJHC 316** held,

"The remedy for unjust enrichment is restitution which is the reversal of an unjust enrichment of the defendant at the expense of the plaintiff. The measure of the plaintiff's recovery in restitution is the benefit or gain of the defendant and not, as in compensatory damages, the loss suffered by the plaintiff. A restitutionary (sic) order once made, compels the defendants to disgorge, and the plaintiff to recoup, benefits which have been unjustly obtained and retained by the defendants to the detriment of the plaintiffs.

In ***Pravery & Mathews Pty Ltd v Paul [1987] HCA 5, [1987] 162 CLR 221****, the High Court of Australia recognized unjust enrichment as a valid basis of liability in a claim for restitution for quantum merit".*

29. Moreover, in the ***Manohan Aluminum & Glass (Fiji) Ltd (Supra)*** the pre-requisites for a claim on 'unjust enrichment' have been identified as follows,

"Unjust enrichment arises in a situation in which the defendant is enriched at the expense of the claimant and there is in addition a reason, not being a manifestation of consent or a wrong, why that enrichment should be given up to the claimant (Peter Berks, Unjust Enrichment, Second edition 2005).

Unjust enrichment has also been described as follows:

The principal of unjust enrichment requires first, that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the claimant, and that the retention of enrichment be unjust and finally that there is no defence or bar to the claim".

30. Plaintiffs' submission that they mistakenly built a house on the land belonging to the Defendants can hardly fit in this description of 'unjust enrichment'. Neither of the Defendants have been residing in Fiji, for over a half decade, at the time the Plaintiffs built the house on the Defendants land. Instead, both the Plaintiffs were residing in Fiji at the time. The Defendants land on which the Plaintiffs house was built on is situated in another street from that of the Plaintiffs land. Any reasonable person cannot be expected to spend a substantial amount of money close to $ 80000.00 to build a house and not to check upon whether that house is built on your land or otherwise, whilst residing in Fiji and having means to check on the same. This is not a case of an encroachment of a land due to mistaken boundaries. The Plaintiffs built a house, a permanent structure, on a completely different land that of theirs. This can hardly be considered a mistake of fact under any reasonable considerations. In view of these facts and circumstances, it is my considered view that the Defendants submission that the Plaintiffs action of building this house on the Defendant's land is in fact an illegal act and not a simple mistake of fact.

31. In view of the considerations made as per the foregoing paras, it is my conclusive finding that the Plaintiffs fail to show that there is a reasonable cause of action for them for 'unjust enrichment' against the Defendants based on 'mistake'.

32. Although the Court has now found that there is no reasonable cause of action for the Plaintiff in bringing this action, I shall proceed to consider the arguments on the claim being statute barred and thus is frivolous, vexatious, or otherwise an abuse of process of the Court.

33. If the 'mistake of fact' to be considered the basis for the Plaintiffs alleged cause of action for 'unjust enrichment' then the cause of action is clearly time barred as the mistake was discovered in 2007. Pursuant to section 15 of the Limitations Act, the limitations time of 06 years applicable in this claim for damages shall run from the date the alleged 'mistake' was discovered. In this instance the Plaintiff was notified of their wrongdoing of building a house on the Defendants land in 2007 and the Plaintiff was also evicted from the said land in a court proceeding in 2007. As such the alleged 'mistake' has clearly been discovered in 2007. But this current action has been initiated on the 04/08/2020 and the 06-year prescription period has already lapsed in 2013.

34. The Plaintiffs contention, that the prescription period for this case must be considered as per the time on which the previous action (HBC 87/2013) been initiated, is clearly

misguided. That action has been dealt with by the Court and is now concluded. Even at the time that action was dismissed on a technicality, the alleged cause of action had had been statute barred. In these circumstances, it is legally required, and the Plaintiffs should duly have sort leave of court to extend the time of prescription from the High Court prior to initiating this action. It is completely bizarre to suggest that the time of prescription should be considered on an action that is already been dealt with by the court and not on the current action itself. The case of ***John Cauchi vs Air Fiji Limited & Air Pacific Limited (Supra)*** is factually different from this case. However, even in that case the court considered the 'bringing of the action' only resorting to the facts of the case at hand and not based on another case that was already concluded.

35. Moreover, the argument that the Plaintiff has a continuous cause of action pursuant to the case of ***Lok v Director of Lands (Supra)*** is equally misconceived in law. In that case the claim arose from a sale and purchase agreement for a piece of land. The preconditions as per the agreement had not been fulfilled by the defendant in that case even after 36 years. As such the Court found that there was a continuous cause of action. Contrastingly, there is no such precondition that is not fulfilled by the defendant in this case for the Plaintiff to claim that there is a continuous cause of action in this matter.

36. The principle of a continuous cause of action is not available in an action under 'unjust enrichment'. In such cases the cause of action commences from the date of the benefit being made available to defendant at plaintiffs' expense or from a date on such 'mistake', if there's one relied upon as such, was discovered upon. I therefore find that the case of ***Lok v Director of Lands (Supra)*** has no application to the facts of the matter at hand.

37. Further, the argument that this action is covered under section 4 (4) of the Limitations Act is bordering on absurdity. This is not an action brought upon a Judgement for enforcement. I do not think that there is a need for any further explanation on this argument as the wordings of section 4 (4) of the Limitations Act are quite unambiguous.

38. Based on above findings it is my overall conclusion that the Plaintiffs action is, in any event, statute barred pursuant to the provisions in section 4 and 15 of the Limitations Act.

39. In view of the above discussion and findings of the Court, I conclude that the Plaintiffs action discloses no reasonable cause of action and is in fact scandalous, frivolous, and vexatious and prejudices, embarrass and delay the fair trail of the action and that it is otherwise an abuse of the process of the Court.

40. It is accordingly my considered view that this action is plainly unsustainable.

41. Based on the above findings and the conclusions of the Court, I am satisfied that this is a fit case to exercise the discretionary power of the Court under Order 18 Rule 18 (1) and wholly strike out all pleadings of the Plaintiff.

42. In the final outcome, Court makes the following orders,

a. The Summons to Strike Out as filed by the Defendants on 09/06/2021 is hereby allowed subject to costs against the Plaintiff, that shall be summarily assessed by the Court,
b. Plaintiffs Writ of Summons and Statement of Claim filed on 04/09/2020 and the Reply to the Statement of Defence and the Defence to Counter Claim filed on the 13/05/2022 is hereby wholly struck out and dismissed pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988,
c. Plaintiff shall pay a cost of $ 5000.00 to the Defendants as summarily assessed by the Court,
d. Defendants to confirm whether they are to proceed with the Counter Claim.

L. K. Wickramasekara,
Acting Master of the High Court.

At Lautoka,
27/10/2023.